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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)
)
 Plaintiff,) CR. NO. 005-53
)
 vs.)
)
AHMED OMAR ABU ALI,)
)
 Defendant.)
)

MOTIONS HEARING

October 28, 2005

BEFORE: THE HONORABLE GERALD BRUCE LEE
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: OFFICE OF THE UNITED STATES ATTORNEY
 BY: DAVID LAUFMAN, ESQ.
 STEPHEN CAMPBELL, ESQ.
 ROBERT SPENCER, ESQ.
 JERRY DEMAIO, ESQ.
 2100 Jamieson Ave.
 Alexandria, Virginia 22314

FOR THE DEFENDANT: THE NUBANI LAW FIRM
 BY: ASHRAF NUBANI, ESQ.

1 (Thereupon, the following was heard in open
12:32:09 2 court at 12:17 p.m.)
12:32:09 3 THE CLERK: Criminal action 05-53, United
12:32:12 4 States of America versus Mr. Abu Ali. Are counsel
12:32:14 5 present and ready, please.
12:32:16 6 MR. LAUFMAN: Good afternoon, Your Honor.
12:32:20 7 David Laufman for the United States with assistant
12:32:22 8 United States Attorney Steve Campbell, Rob Spencer,
12:32:25 9 Department of Justice trial attorney Jerry DeMaio and
12:32:29 10 special United States Attorney Marla Tusk.
12:32:31 11 THE COURT: Good afternoon.
12:32:33 12 MR. NUBANI: Good afternoon, Judge. Ashraf
12:32:36 13 Nubani for Mr. Abu Ali who has waived his presence here
12:32:39 14 with permission of the Court.
12:32:40 15 THE COURT: Good afternoon, Mr. Nubani.
12:32:41 16 I've read your motion and I want to be clear on the
12:32:48 17 issue that's presented.
12:32:55 18 My first question is, is the existence of
12:33:01 19 al-Qaeda an issue in this case, a contested issue from
12:33:04 20 the defense?
12:33:09 21 MR. NUBANI: That -- that -- that there's an
12:33:12 22 organization called al-Qaeda?
12:33:16 23 THE COURT: No, that there's a terrorist
12:33:19 24 organization called al-Qaeda. It seems to me that some
12:33:22 25 of these issues ought to be stipulated to. But if you

12:33:24 1 want to have a contest of whether al-Qaeda is a foreign
12:33:27 2 terrorist organization, I guess the government would
12:33:29 3 have to offer some evidence, wouldn't they?

12:33:31 4 MR. NUBANI: Judge, we're willing to
12:33:33 5 stipulate to certain issues. I didn't mention it in my
12:33:35 6 motion, but we certainly are willing to do that.

12:33:37 7 THE COURT: Tell me what you're willing
12:33:39 8 to -- I'm trying to figure out what's at issue. And the
12:33:41 9 government says they want to offer a witness concerning
12:33:43 10 the history and structure of al-Qaeda.

12:33:45 11 It seems to me that would be irrelevant if
12:33:48 12 everybody stipulates al-Qaeda is a designated terrorist
12:33:54 13 organization.

12:33:54 14 MR. NUBANI: We would stipulate al-Qaeda is
12:33:57 15 a designated foreign terrorist organization.

12:34:00 16 THE COURT: And is there a contest about a
12:34:03 17 terrorist cell called al-Faq'asi and the Sultan Jubran
12:34:12 18 cell? Is there a contest that those were not al-Qaeda
12:34:16 19 cells from your side?

12:34:18 20 MR. NUBANI: Judge, well, I think that there
12:34:20 21 is some question about that. And I -- and I'll give the
12:34:25 22 reasons and I think through the Saudi witnesses, it
12:34:30 23 depends on how you -- how you interpret al-Qaeda.

12:34:34 24 Since September 11th, there have been
12:34:37 25 al-Qaeda affiliated organizations throughout the Muslim

12:34:41 1 world that have been created in the last four years.

12:34:44 2 And, their affiliation may be those who

12:34:48 3 actually give what is known as bayat (phonetic), which

12:34:50 4 is to give allegiance to Osama bin Laden and his

12:34:54 5 cohorts.

12:34:55 6 And there are people who have nothing to do

12:34:57 7 with them but espouse the same methods and means to

12:35:02 8 either reaching power if that's the case or in terms of

12:35:09 9 disrupting what they view as western interests in their

12:35:15 10 perspective countries.

12:35:17 11 So, whether the al-Faq'asi cell is, you

12:35:21 12 know, one that has given allegiance to bin Ladin or not,

12:35:29 13 we would even be willing to sit down with the government

12:35:31 14 after hearing what the government has to say and maybe

12:35:33 15 stipulate to some of those issues.

12:35:34 16 I'm not prepared to do that now, but we

12:35:37 17 certainly would be prepared to do that in order to

12:35:41 18 limit -- to either -- to exclude the testimony of -- the

12:35:44 19 proposed testimony of Mr. Kohlmann or at least limit it

12:35:47 20 so that we can get beyond those issues and then get to

12:35:50 21 the heart of the issue.

12:35:52 22 I do also want to just -- on that issue, as

12:35:56 23 I alluded to, indicated in the motion, that the Saudi --

12:36:02 24 the Saudi foreign witnesses have already testified to

12:36:07 25 that issue in particular.

12:36:09 1 And for Mr. Kohlmann to come to take that
12:36:13 2 out of the purview of the jury and make conclusions in
12:36:17 3 his factual representations about al-Qaeda and its
12:36:21 4 history in Saudi Arabia and so forth, I think would be
12:36:28 5 amphipathical to what we're trying to do and therefore
12:36:32 6 the government, you know, has other ways of doing that.

12:36:34 7 There are people that are within the
12:36:36 8 government that have the very same information that they
12:36:38 9 claim Mr. Kohlmann has, and so --

12:36:40 10 THE COURT: Well, I'm not discounting your
12:36:42 11 claim that Mr. Kohlmann is not an expert. I just wanted
12:36:46 12 to ask what was in issue because I wanted to focus us
12:36:50 13 this afternoon on just what -- what is really the issue
12:36:53 14 here and what the government's trying to do with this
12:36:57 15 witness.

12:36:57 16 So, to be clear, I understand your position
12:36:59 17 about first of all, this is not the proper subject
12:37:01 18 matter for expert testimony. And even if it is, this
12:37:04 19 witness' reading on the Internet and writing pages and
12:37:08 20 in college may not be of sufficient basis to qualify as
12:37:11 21 an expert under Federal Rules of Evidence with this
12:37:14 22 judge.

12:37:15 23 But I was trying to figure out -- do you
12:37:16 24 have a copy of the superseding indictment with you?

12:37:18 25 MR. NUBANI: Judge, I don't.

12:37:19 1 THE COURT: Okay. Well, I'm going to give
12:37:20 2 you -- get a copy for you and government counsel.
12:37:25 3 It seems to me that some of this is not in
12:37:28 4 issue. And if it's not in issue, we may not have to
12:37:30 5 reach all these issues about Mr. Kohlmann.
12:37:32 6 I've now asked you the questions that I
12:37:34 7 have. Is there more you want to say? I've read your
12:37:37 8 submission.
12:37:37 9 I'm trying to figure out what is he an
12:37:39 10 expert in. He's read books and things. I don't know
12:37:43 11 that that makes him an expert about Saudi Arabia if he's
12:37:45 12 never been there.
12:37:45 13 MR. NUBANI: Right, we have no indication
12:37:47 14 that he's been there. I don't know if he has been
12:37:49 15 recently since we've gathered our information.
12:37:52 16 THE COURT: Even if he has, if he hasn't
12:37:53 17 been meeting with terrorists, I don't know that it would
12:37:55 18 be of sufficient liability.
12:37:56 19 Let me hear from the government.
12:37:58 20 MR. NUBANI: That is our position, Judge.
12:38:00 21 THE COURT: Uh-huh.
12:38:05 22 MR. LAUFMAN: Thank you, Your Honor.
12:38:08 23 THE COURT: Mr. Laufman, what I have in
12:38:10 24 front of me is your October 24th letter, your
12:38:13 25 designation of what you say Mr. Kohlmann's going to say.

12:38:16 1 MR. LAUFMAN: Can I hand up to the Court,
12:38:17 2 please, through the court security officer's assistance
12:38:21 3 a copy of Mr. Kohlmann's CV.

12:38:23 4 THE COURT: That's attached to the letter.
12:38:25 5 He went to law school. I got that part.

12:38:27 6 MR. LAUFMAN: And this is an excerpt of the
12:38:31 7 transcript from the trial of Sabri Ben Kahla where Judge
12:38:38 8 Brinkema qualified him as an expert because of his
12:38:39 9 background.

12:38:39 10 THE COURT: Did she qualify him as an expert
12:38:41 11 in al-Qaeda? What did she qualify him as an expert to
12:38:43 12 do?

12:38:44 13 MR. LAUFMAN: Yes, sir. Let me go over
12:38:51 14 the -- I was going to address his prior qualifications
12:38:54 15 as an expert.

12:38:55 16 THE COURT: Before you do, let me -- let's
12:38:56 17 go back to my first focus which is what the issue here
12:38:59 18 that is in controversy that the government believes you
12:39:04 19 have to offer evidence about? It sounds like the
12:39:06 20 defense is willing to stipulate that al-Qaeda is a
12:39:09 21 designated foreign terrorist organization and there is
12:39:12 22 no fight about what al-Qaeda is.

12:39:14 23 MR. LAUFMAN: Well, the fundamental issue
12:39:16 24 here, Your Honor, is not whether al-Qaeda is a
12:39:17 25 designated foreign terrorist organization. The United

12:39:20 1 States government has designated them.

12:39:21 2 The Court can take judicial notice that the
12:39:23 3 President of the United States designated al-Qaeda as a
12:39:26 4 foreign terrorist organization.

12:39:27 5 The key issue in this case is whether this
12:39:30 6 cell that the defendant allegedly joined is an al-Qaeda
12:39:35 7 cell.

12:39:35 8 There are four counts in the indictment that
12:39:38 9 require the government to prove that the terrorist cell
12:39:41 10 the defendant joined was al-Qaeda.

12:39:44 11 Count I, conspiracy to provide material
12:39:46 12 support and resources to a designated terrorist
12:39:50 13 organization in violation of 18 U.S.C. 2339(B). Count
12:39:55 14 II, actually providing material support to a designated
12:39:57 15 foreign terrorist organization also in violation of 18
12:40:00 16 U.S.C. 2339(B). Count V, contributing services to
12:40:05 17 al-Qaeda in violation of the International Emergency
12:40:09 18 Economic Powers Act, and implementing regulations and
12:40:13 19 Count VI receiving funds and services from al-Qaeda.

12:40:16 20 In each of those cases, with respect to each
12:40:17 21 of those counts, the government has the burden of proof
12:40:19 22 of showing that this cell that the defendant joined is
12:40:22 23 an al-Qaeda cell. And it will not be enough for the
12:40:25 24 defense to simply stipulate that al-Qaeda generically is
12:40:28 25 a foreign terrorist organization because --

12:40:30 1 THE COURT: So, the evidence you have that
12:40:32 2 this is al-Qaeda cell is just through Mr. Kohlmann?

12:40:36 3 MR. LAUFMAN: No, sir. We are going to rely
12:40:38 4 on the confession evidence, if that comes in to
12:40:43 5 evidence, his own confessions that he knew and
12:40:46 6 understood that these individuals were al-Qaeda.

12:40:50 7 But, we don't take anything for granted with
12:40:53 8 this jury. The defense --

12:40:55 9 THE COURT: No, I guess if -- I'm not trying
12:40:57 10 to pry into your trial strategy. But I'm trying to
12:41:00 11 understand why Mr. Kohlmann is necessary.

12:41:02 12 If I've read what has been submitted to me
12:41:04 13 correctly, he's never been to Saudi Arabia. And even if
12:41:07 14 he has, he hasn't met with terrorists or been involved
12:41:11 15 with any al-Qaeda activities.

12:41:13 16 So the fact that he read about it in my
12:41:14 17 view, doesn't make him an expert on al-Qaeda, just that
12:41:17 18 he read about it.

12:41:18 19 MR. LAUFMAN: Well, I would disagree with
12:41:19 20 the Court respectfully with respect to whether scholarly
12:41:22 21 work is a basis for qualifying an expert in the field of
12:41:27 22 assessing terrorist organizations.

12:41:29 23 But, setting aside his academic and
12:41:33 24 professional work that he now serves as a consultant
12:41:38 25 both to the FBI and to New Scotland Yard, he is widely

12:41:42 1 recognized, quoted by major news media organizations.

12:41:44 2 He has published a book in addition to publishing many

12:41:48 3 articles.

12:41:49 4 Whether or not he's been to Saudi Arabia, I

12:41:51 5 don't know. But, travel to Saudi Arabia is not a sine

12:41:55 6 qua non of whether someone is an expert on affairs in

12:41:57 7 that country with respect.

12:41:59 8 And he has in fact, met with terrorists and

12:42:01 9 we will provide -- produce to the defense hopefully

12:42:04 10 later today a synopsis of what we propose him to testify

12:42:10 11 about as soon as it is available which will, among other

12:42:13 12 things, mention that he has met with people who are

12:42:17 13 terrorists and that contributed to his body of knowledge

12:42:20 14 and expertise about how al-Qaeda operates, how it's

12:42:23 15 organized.

12:42:23 16 There are -- may I continue, Your Honor?

12:42:31 17 THE COURT: Yeah, I'm listening.

12:42:32 18 MR. LAUFMAN: We expect him to elaborate on

12:42:35 19 what we put in the notice letter --

12:42:37 20 THE COURT: Well, the notice letter to me is

12:42:39 21 only one paragraph. It says, will testify as an expert

12:42:42 22 witness concerning the history and structure of

12:42:44 23 al-Qaeda.

12:42:44 24 MR. LAUFMAN: Right. So --

12:42:46 25 THE COURT: I'm sorry. I'm not finish.

12:42:47 1 MR. LAUFMAN: Yes, sir.

12:42:48 2 THE COURT: And the basis for concluding,
12:42:49 3 meaning his opinion that the terrorist cell headed by
12:42:53 4 al-Faq'asi and Al-Qahtani was an al-Qaeda cell.

12:42:58 5 So he is just going to make the leap based
12:43:00 6 upon what he's read.

12:43:01 7 MR. LAUFMAN: Well, not just on what he's
12:43:04 8 read. He has -- there is a great deal of information in
12:43:07 9 the public mainstream, including press releases by
12:43:12 10 al-Qaeda in the Arabian peninsular. For example, when
12:43:19 11 Sultan Jubran was killed, there was a memorial notice
12:43:23 12 put on a website about his martyrdom.

12:43:24 13 There is a great deal of information --

12:43:24 14 THE COURT: Are you saying to me that you're
12:43:25 15 going to rely upon things on the Internet? That's it?

12:43:29 16 MR. LAUFMAN: That's not just it, Your
12:43:30 17 Honor. But the Internet is used widely by al-Qaeda --

12:43:34 18 THE COURT: By all kinds of people who write
12:43:36 19 all kinds of things.

12:43:37 20 Let me do this because I think you see which
12:43:39 21 way this is headed. If what you're -- if what you
12:43:43 22 presented to me is what you intend to present in terms
12:43:45 23 of offering this person, Mr. Kohlmann, as an expert on
12:43:49 24 the subject matter you're describing in this paragraph
12:43:54 25 two of this October 24th letter, I can give you a ruling

12:43:56 1 right now.

12:43:57 2 If you would like to have an opportunity to
12:43:58 3 present some evidence, I'll be happy to do that perhaps
12:44:02 4 next Friday. But I don't -- at this moment, there's no
12:44:04 5 way I'm going to let him come in and testify about what
12:44:07 6 he read about, what he wrote in his own -- his book that
12:44:10 7 he probably published himself and that he works for the
12:44:13 8 government and the government pays him to testify to do
12:44:16 9 things for them.

12:44:17 10 That to me doesn't make him an expert in
12:44:20 11 al-Qaeda, no way.

12:44:21 12 MR. LAUFMAN: Your Honor -- pardon. He's
12:44:23 13 been qualified by this Court as an expert on al-Qaeda.
12:44:25 14 I understand that Your Honor hasn't qualified him.

12:44:27 15 THE COURT: The judgment of a district judge
12:44:30 16 concerning expert witnesses is governed by Rule 702 of
12:44:35 17 the Federal Rules of Evidence. And the judge has to
12:44:37 18 make a judgment whether a person is qualified by
12:44:39 19 experience, education or training to offer reliable
12:44:43 20 testimony about a subject matter that's beyond the kin
12:44:47 21 of the average juror.

12:44:48 22 If what you've shown me -- if what you've
12:44:50 23 shown me is your proffer, I'm prepared to make a
12:44:53 24 judgment right now.

12:44:54 25 I've invited you to present some evidence,

12:44:56 1 but I have difficulty with the idea that someone who has
12:45:00 2 never done any real law enforcement or intelligence work
12:45:05 3 where he has infiltrated terrorist cells or worked with
12:45:09 4 terrorists or had contact with them is going to come in
12:45:13 5 here and tell the jury that based upon what he's read on
12:45:16 6 the Internet and his own writings that he thinks that
12:45:21 7 this al-Faq'asi cell and Al-Qahtani cell belong to
12:45:25 8 al-Qaeda.

12:45:26 9 If that's all you have, it's not going to
12:45:28 10 happen in this courtroom. Maybe it happened in another
12:45:30 11 courtroom, but not in this one.

12:45:31 12 MR. LAUFMAN: May I continue, please.

12:45:32 13 THE COURT: Well, I'm asking you to make a
12:45:34 14 judgment now. Do you want me to rule or do you want to
12:45:37 15 have a chance to put on some testimony?

12:45:38 16 MR. LAUFMAN: Well, I would like to have a
12:45:40 17 chance to proffer to the Court some additional
12:45:42 18 information I plan to proffer.

12:45:43 19 THE COURT: Okay. I can go forward with the
12:45:44 20 proffer if you'd like.

12:45:45 21 MR. LAUFMAN: First of all, I want to make
12:45:47 22 clear for the record that Mr. Kohlmann has twice been
12:45:51 23 qualified as an expert in this court on --

12:45:53 24 THE COURT: An expert in what? Tell me --

12:45:55 25 MR. LAUFMAN: As an expert on al-Qaeda among

12:45:58 1 other subjects based on the same qualifications we
12:46:02 2 tendered to the Court now. And, I -- with no disrespect
12:46:06 3 to Your Honor --

12:46:06 4 THE COURT: Show me what Judge Brinkema says
12:46:09 5 she qualified him to do.

12:46:10 6 MR. LAUFMAN: If I could -- the transcript I
12:46:12 7 gave you, Your Honor, is from the Ben Kahla trial, and
12:46:16 8 if you look at the last page, which is page 195. Now --

12:46:23 9 THE COURT: I'm tendering Mr. Kohlmann as an
12:46:27 10 expert in modern Afghanistan politics. To you is that
12:46:33 11 the same as saying he's an expert in al-Qaeda?

12:46:36 12 MR. LAUFMAN: I've looked at the --

12:46:36 13 THE COURT: Judge Brinkema says, "All right,
12:46:38 14 I'm going to accept him". He's tendered as an expert in
12:46:42 15 modern Afghanistan politics. Is that the same to you as
12:46:46 16 being an expert in al-Qaeda?

12:46:48 17 MR. LAUFMAN: I conferred with the trial
12:46:49 18 attorney in that case. He confirmed to me he was
12:46:50 19 accepted. He was proffered as an expert on al-Qaeda.

12:46:52 20 THE COURT: Did I read the transcript
12:46:53 21 incorrectly? I'm looking at page 195, line nine through
12:46:57 22 ten. Did I read that incorrectly?

12:46:59 23 MR. LAUFMAN: You did not read it
12:47:01 24 indirectly, Your Honor. I'm simply pointing out to you,
12:47:03 25 respectfully, that he was offered as an expert on

12:47:05 1 al-Qaeda. He did testify as an expert on al-Qaeda at
12:47:08 2 that trial, and he was proffered and accepted by Judge
12:47:12 3 Brinkema as an expert on al-Qaeda in the Al-Timimi case
12:47:16 4 as well.

12:47:16 5 So, I'm representing to the Court based on
12:47:18 6 my conversations with the trial attorney, he's been
12:47:21 7 twice qualified as an expert on al-Qaeda in this court.

12:47:26 8 To the extent the Court has concerns about
12:47:28 9 the reliability of Mr. Kohlmann's assessment of
12:47:34 10 materials that are in the public mainstream, and the
12:47:37 11 Internet is simply an enormous public library now. The
12:47:41 12 fact that something is on the Internet --

12:47:42 13 THE COURT: You call the Internet a library?

12:47:44 14 MR. LAUFMAN: It is an immense resource of
12:47:46 15 information, Your Honor, just as a public library can
12:47:49 16 be.

12:47:49 17 Whether you attach weight or credibility to
12:47:51 18 it depends on the specific facts and circumstances of
12:47:54 19 the specific item of information.

12:47:55 20 THE COURT: It does. Let me make sure I'm
12:47:57 21 clear what you're telling me about this witness. So,
12:48:02 22 you would summarize his knowledge, his body of knowledge
12:48:06 23 as being derived from classes he's taken in college and
12:48:11 24 his own self readings; is that right?

12:48:13 25 MR. LAUFMAN: No, Your Honor, that's not the

12:48:15 1 extent of my summary.

12:48:16 2 THE COURT: Well, that's part -- that's a
12:48:18 3 substantial part of it because as you said earlier, he's
12:48:21 4 never worked with al-Qaeda personally. He's never meet
12:48:26 5 bin Ladin or anybody else who is in al-Qaeda who has
12:48:30 6 given him information about how al-Qaeda operates. Is
12:48:33 7 that right?

12:48:34 8 MR. LAUFMAN: That's not correct, Your
12:48:35 9 Honor.

12:48:35 10 THE COURT: Then tell me what his personal
12:48:38 11 knowledge base would be.

12:48:38 12 MR. LAUFMAN: He has not met with Osama bin
12:48:40 13 Laden. I will stipulate to that. But meeting Osama bin
12:48:44 14 Laden --

12:48:44 15 THE COURT: I understand. Has he met any
12:48:46 16 member of al-Qaeda?

12:48:47 17 MR. LAUFMAN: He has met with and
12:48:49 18 interviewed terrorists -- I'd have to check the synopsis
12:48:55 19 he proposes to submit as to whether this particular
12:48:59 20 individual was associated with al-Qaeda.

12:49:00 21 THE COURT: So, the answer right now is no.
12:49:02 22 As far as you know, he's never meet with anyone from
12:49:04 23 al-Qaeda?

12:49:05 24 MR. LAUFMAN: I have to -- I don't want to
12:49:07 25 misspeak, Your Honor. He has met with individuals who

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12:49:09 1 are avowed terrorists, who have knowledge of al-Qaeda.

12:49:14 2 I also want to point out to the Court that

12:49:15 3 in the Embassy bombings case in New York, exhibits were

12:49:20 4 admitted into evidence including al-Qaeda training

12:49:23 5 manuals and other documents admitted into evidence in

12:49:28 6 that trial that Mr. Kohlmann has reviewed. Some of

12:49:31 7 those documents continue to form a basis for the most

12:49:35 8 intricate understanding of how al-Qaeda operates, it's

12:49:38 9 organization, the manner in which it operates in a

12:49:42 10 clandestine manner.

12:49:44 11 This jury has to be educated about how

12:49:46 12 al-Qaeda operates.

12:49:47 13 THE COURT: Can I ask you a question about

12:49:48 14 what you just said?

12:49:49 15 MR. LAUFMAN: Yes, sir.

12:49:50 16 THE COURT: In the case in New York that was

12:49:51 17 tried, what was the basis for the admissibility of the

12:49:54 18 documents supposedly authored by al-Qaeda? What was the

12:49:58 19 basis for the submission of those documents?

12:50:00 20 MR. LAUFMAN: I'm not certain, Your Honor.

12:50:02 21 I think some of them may have been -- pardon me.

12:50:21 22 Thank you, Your Honor. I wanted to confer

12:50:22 23 with Mr. Spencer.

12:50:24 24 In the Embassy bombings case, an al-Qaeda

12:50:27 25 member by the last name of El-Fahd testified as a

12:50:31 1 government witness and testified to the authenticity of
12:50:34 2 the documents the government offered into evidence.

12:50:37 3 Those are documents that more, than any
12:50:40 4 other source of information, detail the operations of
12:50:44 5 al-Qaeda, it's organization, it's structure, how it
12:50:47 6 operates at the cell level, how it engages in the
12:50:50 7 certain kinds of trade crafts and operational secrecy
12:50:54 8 that we see evident in this defendant's confession.

12:50:57 9 THE COURT: So, this was an al-Qaeda member
12:50:59 10 who offered the documents in evidence and offered a
12:51:02 11 basis to authenticate them?

12:51:03 12 MR. LAUFMAN: Yes, sir, through --

12:51:04 13 THE COURT: But in this case, you do not
12:51:06 14 have an al-Qaeda member who is going to testify?

12:51:08 15 MR. LAUFMAN: We do not have any al-Qaeda
12:51:10 16 member testifying, but the documents that Mr. Kohlmann
12:51:12 17 in part will base his assessment on with respect to
12:51:15 18 whether the al-Faq'asi cell was an al-Qaeda cell will
12:51:20 19 form in part the basis for his judgment that the
12:51:22 20 al-Faq'asi cell is an al-Qaeda cell.

12:51:26 21 THE COURT: All right. Well, I understand
12:51:27 22 that experts can rely upon hearsay, but he has to pass
12:51:31 23 the test of being an expert first.

12:51:32 24 Can I ask you another question?

12:51:33 25 MR. LAUFMAN: Yes, sir.

12:51:33 1 THE COURT: In what way has Mr. Kohlmann's
12:51:36 2 opinions been tested to demonstrate that they're
12:51:40 3 reliable and what methods has he used to gather his
12:51:43 4 information?

12:51:44 5 MR. LAUFMAN: Well, Your Honor, I don't know
12:51:46 6 whether it's been tested in the Daubert sense. This is
12:51:50 7 not a -- this is not a type of science where there's
12:51:56 8 peer review. He did not submit himself --

12:51:59 9 THE COURT: Dissertations are typically peer
12:52:03 10 reviewed. There are papers that are peer reviewed in
12:52:06 11 various symposiums by people who deliver papers on
12:52:12 12 historical issues.

12:52:13 13 What kinds of things like that has
12:52:14 14 Mr. Kohlmann does?

12:52:15 15 MR. LAUFMAN: Your Honor, I'm not aware of
12:52:16 16 any testing in the context the Court is using it. But I
12:52:19 17 believe the ultimate standard in Daubert is one of
12:52:22 18 reliability. And he has twice been qualified as an
12:52:24 19 expert in this court. He is going to be qualified next
12:52:27 20 week in another terrorism prosecution in New York.

12:52:30 21 The defense can cross examine him until the
12:52:33 22 cows come home to explore his bias, his qualifications.
12:52:37 23 If they think he's some callow youth who doesn't know
12:52:42 24 that of which he speaks, they can try to go down that
12:52:45 25 road.

12:52:45 1 The fact of the matter is he is prodigious
12:52:48 2 talent with demonstrated knowledge and expertise in the
12:52:50 3 field of terrorism. He has been qualified as an expert.
12:52:53 4 He is recognized around the world as an expert. And
12:52:55 5 what the defense is trying to do and what we ask you not
12:52:57 6 to let them do is to sanitize the government's case.
12:53:00 7 That is what they're trying to do. They want to excise
12:53:02 8 the word al-Qaeda from this case, and that cannot be
12:53:05 9 permitted to happen. We ask the Court not to permit
12:53:07 10 that to happen.

12:53:08 11 THE COURT: All right.

12:53:16 12 MR. NUBANI: Judge, if I may, the qualifying
12:53:20 13 of an expert witness, as the Court knows even though
12:53:22 14 it's done by other courts, this district court has --
12:53:28 15 has the power to independently qualify someone even
12:53:31 16 though they've been qualified by another Court even if
12:53:34 17 it's in the same courthouse.

12:53:36 18 I do want to alert the Court to the fact
12:53:39 19 or -- that in the Al-Timimi trial where he had been --
12:53:45 20 he had been qualified as an expert witness, that whole
12:53:52 21 trial, Judge, is currently on appeal in the Fourth
12:53:56 22 Circuit. And one of the basis of the appeal is the use
12:53:59 23 of expert testimony --

12:54:03 24 THE COURT: Were you in that trial,

12:54:04 25 Mr. Nubani?

12:54:05 1 MR. NUBANI: No, Judge, I wasn't in the
12:54:07 2 trial.

12:54:07 3 THE COURT: But you saw Mr. Kohlmann
12:54:09 4 testify, didn't you?

12:54:09 5 MR. NUBANI: Oh, yes. I was very involved.
12:54:12 6 I just meant I wasn't attorney of record in that trial.
12:54:14 7 But I'm very familiar with the circumstances, with the
12:54:18 8 trial.

12:54:18 9 I'm not as familiar with the process that
12:54:22 10 Judge Brinkema went through in terms of qualifying
12:54:26 11 Mr. Kohlmann, but -- because I was just given the
12:54:29 12 transcript of the direct testimony that qualified him.

12:54:32 13 But, my point is that he being who he is,
12:54:37 14 which I did not put in my motion what his motives are
12:54:40 15 and I'm not going to go -- I'm not going to trouble the
12:54:43 16 Court with that. What I'm trying to say is that just
12:54:46 17 because he's been qualified once or twice, that whole
12:54:50 18 issue of what that type of expert testimony does in
12:54:56 19 these quote unquote "terrorism cases" is going to be a
12:54:59 20 defining issue that is currently upon -- is currently
12:55:03 21 upon -- in the appeals stage.

12:55:05 22 So, it -- I think that the Court needs to
12:55:08 23 make an -- their own independent -- the Court needs to
12:55:12 24 make it's own independent judgment of whether he is
12:55:14 25 qualified, whether it is appropriate in this case,

12:55:18 1 Judge.

12:55:18 2 THE COURT: All right.

12:55:19 3 MR. NUBANI: I just want to respond to some
12:55:21 4 of the things that the government said. In terms of
12:55:23 5 peer review, that's the whole point.

12:55:25 6 Judge, after September 11th, the whole
12:55:30 7 academic community, people who wanted to benefit,
12:55:34 8 everyone is running to this area topic.

12:55:36 9 Of course, the academic community takes a
12:55:38 10 longer time to respond. I mean, ten years from now,
12:55:40 11 there will be peer review of what really al-Qaeda was,
12:55:44 12 how it operated, what its goals were and by that time,
12:55:47 13 maybe the whole situation in the Middle East and
12:55:49 14 vis-a-vis the West will have changed anyway.

12:55:52 15 But the point is, it's inappropriate for
12:55:54 16 someone who just graduated from law school who I say has
12:55:57 17 motives which I'm not going to get into and has motives
12:56:00 18 to be the Dougie Howser of terrorism in these cases.

12:56:04 19 And just one more point, Judge, again, I
12:56:07 20 know that you didn't want to push the government and
12:56:09 21 appropriately so, on what their -- what their case in
12:56:12 22 chief is going to be in term of strategy. But they did
12:56:14 23 say that through the confessions themselves, if the
12:56:16 24 confessions are admitted, then, there is evidence there.

12:56:19 25 The foreign witness testimony depositions,

12:56:23 1 there is evidence there. The jury can make those
12:56:26 2 determinations without having to know what the history
12:56:28 3 of al-Qaeda is, how it operates and so forth.

12:56:31 4 Those are things that we can stipulate to
12:56:35 5 and things that we can -- we can develop through the
12:56:39 6 process of the trial.

12:56:40 7 But, to have the government bring Evan
12:56:44 8 Kohlmann as they want to do at the beginning of the
12:56:47 9 trial is totally inappropriate.

12:56:51 10 If it's later decided that that has to
12:56:53 11 change, that's fine. But they can't bring him in to set
12:56:56 12 the stage of the way they want things to be. And,
12:56:59 13 that's just inappropriate.

12:57:01 14 The other point I wanted to make is --

12:57:03 15 THE COURT: Is it your view that the
12:57:04 16 Internet is a reliable source for making a judgment
12:57:10 17 about the credibility of information about how a
12:57:13 18 clandestine terrorist cell operates?

12:57:17 19 MR. NUBANI: Not under the test of Daubert,
12:57:19 20 certainly not, because it's just -- it's not -- it's not
12:57:22 21 reliable.

12:57:23 22 I -- Judge, I can, you know, Muslims have an
12:57:27 23 ability to bring in more reliable evidence on how these
12:57:31 24 groups relate without being a part of those groups than
12:57:33 25 to get things on the Internet.

12:57:35 1 Of course, I don't think that it's reliable
12:57:37 2 at all.

12:57:37 3 THE COURT: All right. Mr. Nubani, I think
12:57:39 4 I have what I need to make a judgment now.

12:57:40 5 All right, this matter is before the Court
12:57:42 6 on the defense motion to exclude the testimony of
12:57:45 7 Mr. Evan Kohlmann, who has been proffered by the
12:57:48 8 government, and I'm reading from the October 24th letter
12:57:51 9 of the prosecutor to Mr. Nubani which says, "Evan F.
12:57:56 10 Kohlmann will testify as an expert witness concerning
12:57:58 11 the history and structure of al-Qaeda, its organization
12:58:02 12 and operations in the Arabian Peninsular and the basis
12:58:06 13 for concluding that the terrorist cell headed by Ali Abd
12:58:12 14 Al-Rahman al-Faq'asi al-Ghamdi and Sultan Jubran Sultan
12:58:19 15 Al-Qahtani was an al-Qaeda cell". And I'll provide the
12:58:22 16 court reporter with a copy of the letter so she can
12:58:25 17 spell the names.

12:58:25 18 The Court has reviewed the resume' of
12:58:27 19 Mr. Kohlmann which has been proffered and the transcript
12:58:32 20 proffered by the government of the March 8, 2004 hearing
12:58:36 21 before Judge Brinkema in the Ben Kahla case.

12:58:38 22 And on page 195, she says at line nine, "Are
12:58:43 23 you tendering Mr. Kohlmann as an expert in modern Afghan
12:58:47 24 politics? Mr. Kromberg: Yes". Answer -- line 12, "All
12:58:51 25 right, I'm going to accept him. And, I've accepted him

12:58:54 1 as an expert in the other trial. And clearly he has
12:58:56 2 written enough and studied enough on this. I'm going to
12:58:59 3 accept him as an expert. So you can get on with your
12:59:02 4 questions". That's line 15.

12:59:03 5 I recognize that Judge Brinkema has tried
12:59:06 6 the Ben Kahla case and the Al-Timimi case. What I'm
12:59:09 7 being asked to do today is to make a judgment about
12:59:12 8 whether or not Mr. Kohlmann is qualified to render an
12:59:15 9 opinion within the meaning of Federal Rule of Evidence
12:59:18 10 702.

12:59:19 11 I've also been provided with the cross
12:59:22 12 examination of Mr. Kohlmann's transcripts from pages 672
12:59:28 13 to 683. And, what -- what strikes me in reviewing this
12:59:36 14 question is Federal Rule of Evidence 702 says that the
12:59:41 15 trial judge is to make a determination -- and I'm going
12:59:44 16 to read what the rule says. "If scientific, technical
12:59:47 17 or other specialized knowledge will assist the trier of
12:59:52 18 fact to understand the evidence or to determine a fact
12:59:53 19 in issue, a witness qualified as an expert" and I'm
12:59:57 20 going to underline, "by knowledge, skill, experience,
13:00:00 21 training or education", and I underline all four of
13:00:03 22 those, "may testify thereto in the form of an opinion or
13:00:06 23 otherwise, if one, the testimony is based upon
13:00:10 24 sufficient facts or data, two, the testimony is the
13:00:13 25 product of reliable principles and methods, and three,

13:00:17 1 the witness has applied the principles and methods
13:00:20 2 reliably to the facts of the case".
13:00:22 3 This Judge is not persuaded that
13:00:26 4 Mr. Kohlmann's study of the subject matter of terrorism,
13:00:30 5 whatever that is in terms of it's a global subject
13:00:32 6 matter. But I believe it has to do with groups that are
13:00:37 7 organized to carry out political acts of violence
13:00:40 8 against governments but that are not organized
13:00:44 9 governments or entities themselves. That's what I think
13:00:46 10 a terrorist is and that there is a designated foreign
13:00:50 11 terrorist organization, al-Qaeda. There's no contest in
13:00:54 12 this trial what al-Qaeda is.
13:00:56 13 The question is whether Mr. Kohlmann,
13:00:58 14 because he has a law agree from Pen, which he earned in
13:01:02 15 2004 and because he graduated from Georgetown in 2001
13:01:06 16 with a major in politics and international securities
13:01:09 17 studies and a minor in Islamic studies, in and of itself
13:01:13 18 makes him a person who could assist the jury with
13:01:17 19 reliable information about the operation of al-Qaeda.
13:01:20 20 I note that first of all, as far as we
13:01:23 21 can -- has been proffered here today, Mr. Kohlmann has
13:01:27 22 never met anyone from al-Qaeda, has not infiltrated
13:01:31 23 al-Qaeda, has not done any research where he's had
13:01:34 24 contact with someone who was in al-Qaeda to know just
13:01:37 25 what they do or did not do.

13:01:38 1 He's read about it on the Internet and in
13:01:40 2 scholarly books. And certainly a person can qualify
13:01:43 3 based upon reading and education.
13:01:45 4 He's never been to Pakistan, never been to
13:01:48 5 Saudi Arabia, does not speak Arabic, does not speak
13:01:52 6 Urdu, can't read Urdu websites, can't read Arabic
13:02:00 7 websites and has to have them translated for him.
13:02:02 8 He has read many books about the subject
13:02:04 9 matter of terrorism, and he reads and has collected
13:02:07 10 many, many websites from the Internet. And this is a
13:02:11 11 part of his basis for his conclusions about how al-Qaeda
13:02:14 12 and other terrorist groups operates.
13:02:16 13 The Court does not think that the Internet,
13:02:19 14 particularly the postings that he has described here, in
13:02:21 15 and of themselves have any -- there's no way to test the
13:02:26 16 reliability of them. There's no way to know who posts
13:02:28 17 them. There's no way to know who maintains them. There
13:02:31 18 is no way to know whether the information there is
13:02:34 19 accurate or not. And that he has published a book, a
13:02:38 20 self-published book, I note, in and of itself does not
13:02:41 21 make him an expert.
13:02:42 22 And, the fact that the government has hired
13:02:44 23 him to testify as an expert witness in cases including
13:02:49 24 U.S. versus Battleford, Ben Kahla, Randall, Royer,
13:02:56 25 Al-Timimi does not with this judge sit as a basis to

13:02:59 1 qualify him as an expert in al-Qaeda, particularly where
13:03:01 2 he has had no contact with someone from al-Qaeda. All
13:03:05 3 he has done is to read about it.

13:03:06 4 My jury could do an Internet search on
13:03:09 5 Google and read about al-Qaeda.

13:03:12 6 I'm sure that Mr. Kohlmann could probably
13:03:14 7 summarize it for them in a way that would be very
13:03:17 8 helpful, but I'm not of the opinion that Mr. Kohlmann is
13:03:19 9 an expert because he is not qualified by training,
13:03:24 10 because he has none other than what he is self taught.

13:03:27 11 He has not qualified because the methods
13:03:30 12 that he's gathered his information are reading the
13:03:33 13 Internet and reading books. That in and of itself may
13:03:35 14 be a way to learn engineering, but at some point, the
13:03:38 15 engineer has to actually handle a device.

13:03:41 16 Here we have a person who has just read
13:03:43 17 about these things and is being offered to tell the
13:03:45 18 Court about a cell, the Ali Abd Al-Rahman al-Faq'asi
13:03:52 19 cell and the Sultan Jubran cell. He is going to make a
13:03:56 20 judgment that these cell were al-Qaeda cells. He's
13:03:58 21 never been to Saudi Arabia, never interviewed anyone
13:04:01 22 from either of these cells, has no personal knowledge
13:04:04 23 about whether these cell are affiliated with al-Qaeda or
13:04:06 24 anyone else.

13:04:08 25 So for all those reasons, the motion to

1 CERTIFICATE OF REPORTER

2

3 I, Renecia Wilson, an official court
4 reporter for the United State District Court of
5 Virginia, Alexandria Division, do hereby certify that I
6 reported by machine shorthand, in my official capacity,
7 the proceedings had upon the motions in the case of
8 United States of America vs. Ahmed Omar Abu Ali.

9 I further certify that I was authorized and
10 did report by stenotype the proceedings and evidence in
11 said motions, and that the foregoing pages, numbered 1
12 to 29, inclusive, constitute the official transcript of
13 said proceedings as taken from my shorthand notes.

14 IN WITNESS WHEREOF, I have hereto
15 subscribed my name this 9th day of January, 2006.

16

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Renecia Wilson, RMR/CM
Official Court Reporter

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